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The title I have been asked to comment on requires me, I suppose, to answer two questions. First, what distinguishes Buchanan's *contractarian* liberalism from other branches of the classical liberal tradition? And, second, in what sense is the distinctiveness of Buchanan's contractarianism relevant for a '*modern*' liberalism?

Before I address these questions directly, a few introductory remarks are in order to prepare the ground for the arguments I want to develop.

- I presume all varieties of liberalism that may be legitimately counted within the classical liberal tradition to share as their common core
    - the emphasis on *individual liberty* as the foundational principle of a *desirable social order*, and
    - a prima facie preference for *markets* as institutional arrangements within which voluntary contracts are the principal means by which individuals coordinate their activities.
- In contrasting Buchanan's contractarianism with other branches within the classical liberal tradition I need to be selective. I shall concentrate my comparison on Murray Rothbard's *free-market libertarianism* as the extreme counterpart to Buchanan's *contractarian liberalism* and on F.A. Hayek's *evolutionary liberalism* as an intermediate position. In so doing, I presume that what I argue with regard to them is, more or less, relevant for other branches of the classical liberal tradition as well.
- As F.A. Hayek has emphasized, when we talk about social order we must distinguish between the *order of rules* and the *order of actions*, i.e. between the *rules of the game* that govern the behavior of the individuals involved and the *patterns of actions* that result from the individuals' choices within a given framework of rules. This corresponds to Buchanan's distinction between two levels of choice, choice *within* rules (the *sub-constitutional* level) and choice *of* rules (the *constitutional* level).

[1] Prepared for *Buchanan Memorial Conference*, George Mason University, September 28-29, 2013.

- The *order of rules*, the constitutional framework, is essential in determining the nature of the *order of actions*. While the latter is the *immediate* object of interest when the '*desirability'* of a social order is at issue, the order of rules is the *indirect* object of evaluation because of its instrumental role in shaping the order of actions. Rules are not ends in themselves but instruments for shaping the resulting patterns of actions.
- Any conception of a *desirable* social order must include two components, namely a *normative criterion* against which the 'desirability' of different social orders is to be compared, and *factual assumptions* about what are suitable measures (in particular: rules) to create a 'desirable' social order. Accordingly, disagreements on what qualifies as a desirable social order may be due either to disagreements on which *normative criteria* should be applied or to different *factual assumptions* about what are suitable means for bringing about what is considered desirable (or both).
- In comparing Buchanan's, Rothbard's and Hayek's respective versions of liberalism my primary interest will be in identifying the *nature* of the differences that separate them. If their disagreement is about the *normative criterion* that a classical liberal outlook implies it is concerned with what I propose to call *matters of principle*. If their disagreement is about what are adequate means for achieving a liberal order it is concerned with what I propose to call *matters of prudence.*
- At the constitutional level *matters of principle* are intimately linked to the issue of *legitimacy*, the issue of who is authorized to decide what counts as a 'desirable' constitutional order (or *order of rules*). *Matters of prudence* are about the issue of *instrumental adequacy*, about what provisions should be prudently included in a constitutional order as suitable instruments for achieving a 'desirable' order of actions.

Individual Liberty, Private Autonomy and Constitutional Choice

As noted above, I presume that all branches within the classical liberal tradition share as their common core an emphasis on *individual liberty* as the foundational principle of a desirable social order. From this it would seem natural to conclude that Buchanan, Rothbard and Hayek equally base their liberal concepts on a *normative individualism* in the sense that the *evaluations of the individuals themselves* are the only source from which legitimacy in social

matters can ultimately be derived. Accordingly, one might be inclined to assume that if any differences exist between their respective approaches they can only be about *matters of prudence* but not about *matters of principle*. And, in fact, when Buchanan (1999 [1986]: 461) speaks of "the individualistic value norm on which a liberal social order is grounded," Rothbard and Hayek appear to invoke the same "value norm" when the former insists that "only individuals have ends … only individuals can desire and act" (Rothbard 1970: 2), and when the latter notes that "it is the recognition of the individual as the ultimate judge of his ends … that forms the essence of the individualist position" (Hayek 1972: 59). Yet, even though Buchanan (2001 [1977]: 27) posits that the "libertarian anarchist and the contractarian share the individualistic value premise," on closer inspection one cannot fail to notice that there are subtle differences between the ways in which the three authors interpret "the individualistic value norm."

It is the emphasis on individual liberty as *private autonomy* that constitutes the unifying core of the classical liberal tradition. And it is this understanding of individual liberty that Hayek implies when he describes individual liberty as "freedom under the law" (1960: 153), as a condition in which liberty is "limited only by the same abstract rules that apply equally to all" (ibid.: 155).[2] The chief aim of what he refers to as "liberal constitutionalism" is, as he puts it, "to provide institutional safeguards of individual freedom" (1973: 1) and to protect an "assured private sphere" (1960: 13), "a recognizable private domain" (1967: 162).[3] Liberty as *private autonomy* means freedom of choice within rules – the private law order and public regulations – that define individuals' (property) rights.[4] Accordingly, what individual liberty means in substance depends on *how* these rights are defined, and to the extent that their definition changes over time and differs across different communities individuals' private domains will be differently demarcated. Hayek (1960: 229) explicitly points to this fact when he notes that "the recognition of the law of private property does not determine what exactly

[2] Hayek (1979: 111): "Individual liberty … requires that coercion be used only to enforce the universal rules of just conduct protecting the individual domains and that the individual can be restrained only in such conduct as may encroach upon the protected domain of others." – Hayek (1978: 109): "The limitation of all coercion to the enforcement of general rules of just conduct was the fundamental principle of classical liberalism, or, I would almost say, its definition of liberty."

[3] See also Hayek's reference to "the recognized rules of just conduct designed to define and protect the individual domain of each" (1979: 109), and to "a private sphere delimited by general rules enforced by the state" (1960: 144f.).

[4] Hayek (1960: 139): "The 'rights' of the individual are the result of the recognition of such a private sphere." – "The recognition of property is clearly the first step in the delimitation of the private sphere which protects us against coercion" (ibid.: 140).

should be the content of this right."[5] In other words, Hayek recognizes that, in establishing a liberal order, we face a problem of constitutional choice in the sense that the rules of the game are, explicitly or tacitly, selected from a set of potential alternatives. This raises of course the question of how different rule-systems can themselves be comparatively evaluated in terms of the fundamental "*individualistic value norm*" which assigns to the individuals themselves the role as "ultimate judges."

Hayek does not directly address this question, a question that can clearly not be answered by invoking individual liberty qua *private autonomy* as the normative standard since it is itself defined in terms of that (the "abstract rules") which it were to judge. He clearly invokes, though, a normative criterion when he speaks of "appropriate rules"[6] and when he warns against the error of presuming that "the law of property and contract were given once and for all in its final and most appropriate form" (Hayek 1948: 111). He also offers sporadic hints at what he means by "appropriate rules," e.g. when he describes them as rules that "will make the market economy work at its best" (ibid.: 111), when he states that our aim in "altering or developing them should be to improve as much as possible the chances of anyone selected at random" (1976: 129f.), or when he notes that "we should regard as the most desirable order of society one which we should choose if we knew that our initial position in it would be decided purely by chance" (ibid.: 132). Yet, he does not systematically discuss how these standards of "appropriateness" are related to the fundamental "individualistic value norm." Instead, he emphasizes the need to rely on experience in constitutional matters and draws attention to the process of *cultural evolution* as an experimental discovery procedure that helps men to find out, by trial-and-error, which rules are and which are not "appropriate."[7]

It is no more than a conclusion from what has been said above when Hayek (1960: 158) states: "What exactly is to be included in that bundle of rights that we call 'property,' … what contracts the state is to enforce, are all issues in which only experience will show what is the most expedient arrangement." He thereby expresses a view, however, that is in stark contrast to a central tenet of Murray Rothbard's *free-market liberalism*. While Rothbard fully shares Hayek's emphasis on individual liberty as private autonomy, he strongly disagrees with

[5] Hayek (1948: 19): "But if our main conclusion is that an individualist order must rest on the enforcement of abstract principles … this still leaves open the question of the kind of general rules we want."
[6] Hayek (1978: 124f.): "Adam Smith's decisive contribution was the account of a self-generating order which formes itself spontaneously if the individuals were constrained by appropriate rules of law."
[7] To the role of Hayek's theory of cultural evolution in the context of his version of liberalism – which is indeed the reason why I refer to it as "evolutionary liberalism" – I shall return below.

Hayek's cautious view on the issue of how we can know what rules are "appropriate" for demarcating the "assured private sphere" that defines the substance of "individual liberty."[8] According to Rothbard 2002 [1973]: 26), it is "the natural rights basis for the libertarian creed" that provides the definite answer to this issue. In other words, from Rothbard's natural rights perspectiv the law of property and contract *is indeed* "given once and for all in its final form." There exists no problem of *constitutional choice* that would need to be addressed in terms of the "individualistic value norm." The question of what rules should be adopted becomes, instead, a *cognitive problem* for which there can be only right or wrong answers, not one of *subjective evaluation* to be decided by "the individual as the ultimate judge."

Rothbard's ideal libertarian society is a "society formed solely by … an *unhampered market*, or a *free market.*" (1970: 77). It is "a market society unhampered by the use of violence or theft against any man's person or property" (ibid.: 152),[9] or, as Rothbard's follower H.-H. Hoppe calls it, a pure "private law society."[10] For Rothbard the question of "whether or not a certain practice or law is or is not consonant with the free market" (ibid.: 654) is to be judged in terms of whether or not it involves "implicit or explicit theft" (ibid.), for which, in turn, the "institution of private property" (ibid.: 156) provides the required standard. And, as noted above, the question of how we are to determine the appropriate legal specification of the "institution of private property" Rothbard (1998 [1982]: 17) answers by invoking the "natural law discoverable by reason." As he asserts: "In fact, the legal principles of any society can be established in three alternative ways: (a) by following the traditional custom of the tribe or the community; (b) by obeying the arbitrary, *ad hoc* will of those who rule the State apparatus; or (c) by the use of man's reason in discovering the natural law … Here we may simply affirm that the latter method is at once the most appropriate for man" (ibid.).[11]

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[8] Hayek (1960: 139): "Nor would it be desirable to have the particular contents of a man's private sphere fixed once and for all."

[9] To the quoted statement Rothbard (1970: 152) adds the comment: "The question of the *means* by which this condition is best established is not at present under consideration. … Whether the enforcement is undertaken by each person or by some sort of agency, we assume here that such a condition – the existence of an unhampered market – is maintained in some way."

[10] H.-H. Hoppe (2001: 235f.): "Liberals will have to recognize that … liberalism has to be transformed into the theory of private property anarchism (or a private law society) … Private property anarchism is simply consistent liberalism; liberalism thought through to its ultimate conclusion, or liberalism restored to its original intent."

[11] When Hayek (1978: 137) speaks of "indefeasible or natural rights of the individual (also described as fundamental rights or rights of man)" as – along with "the separation of powers" – one of "two conceptions characteristic of liberal constitutionalism" he is clearly not endorsing the kind of natural law philosophy that Rothbard advocates. In Hayek's evolutionary liberalism the concept of natural rights can find a systematic place only in the sense that the codification of law always takes place in the context of pre-existing, shared customary

Once the ground for further argument is provided in this fashion it is only a matter of logic for Rothbard to conclude that, since all legitimate within-market transactions are based on *voluntary contracts* among the parties involved (market exchange being the paradigm example of a voluntary contract),[12] the market society or private law society is a *contractual society*,[13] a "genuinely co-operative society" (Rothbard 1970: 84) with "benefits for all participating individuals" (ibid.: 78). As Rothbard (1956: 250) reasons: "The free market is the name for the array of all the voluntary exchanges that take place in the world. Since every exchange demonstrates an unanimity of benefit for both parties concerned, we must conclude that *the free market benefits all its participants*." The problem with such reasoning is, though, that it disregards the fundamental difference between choices *within rules* and choices *of rules*, the very distinction that is at the heart of Buchanan's contractarianism. To be sure, from the fact that the participants voluntarily agree to the transactions they carry out *within* the rules of the "market game" we may justly conclude that they all expect to benefit from these transactions. Yet, it does not allow us to conclude that they all expect to benefit from the "market game" as such, with its particular rules, compared to "games" played under different rules. The question whether players agree to moves within a game with given rules must surely be distinguished from the question of whether they agree to the rules themselves.

What sets Buchanan's contractarian liberalism apart from Rothbard's as well as from Hayek's (and also other) interpretations of the classical liberal tradition is that he not only explicitly distinguishes – as Hayek also does – between two levels of choice, the constitutional and the sub-constitutional level, but insists that "the individualistic value norm upon which a liberal social order is grounded" requires us to respect individuals' freedom of choice at *both levels*. In Buchanan's (1999 [1991]: 288) own words:

> "The justificatory foundation for a liberal social order lies, in my understanding, in the normative premise that individuals are the ultimate *sovereigns* in matters of social organization, that individuals are the beings who are entitled to choose the organizational-institutional structures under which they will live. In accordance with this premise, the legitimacy of social-organizational structures is to be judged against the voluntary agreement of those who are to live or are living under the arrangements that are judged. The central premise of *individuals as sovereigns* does allow for delegation of decision-making authority to agents, so long as it remains understood

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rules, or, as Hayek (1979: 123) puts it, that "government never starts from a lawless state." – See also Hayek (1976: 60): "The evolutionary approach to law … which is here defended has thus little to do with the rationalist theories of natural law as with legal positivism."

[12] Rothbard (1970: 72): "The major form of voluntary interaction is voluntary interpersonal exchange. … The essence of the exchange is that *both people* make it because they expect that it will *benefit them*."

[13] Rothbard (1970: 77): "A society based on voluntary exchanges is called a contractual society."

> that individuals remain as *principals*. The premise denies legitimacy to all social-organizational arrangements that negate the role of individuals as either sovereigns or principals. On the other hand, the normative premise of individuals as sovereigns does not provide exclusive normative legitimacy to organizational structures that – as, in particular, market institutions – allow internally for the most extensive range of separate individual choice. Legitimacy must also be extended to 'choice-restricting' institutions so long as the participating individuals voluntarily choose to live under such regimes."

It is the very question of "the ultimate justification for regimes of social interaction" that, as Buchanan (ibid.: 281) charges, has often been neglected by "advocates of a liberal or free society embodying the maximal exercise of individual liberties." And it is indeed his singular merit not only to have persistently put this question on the liberal agenda but to have shown how it can be consistently answered from a classical liberal perspective.

The emphasis on individual liberty as private autonomy is for Buchanan no less than for Hayek at the heart of the classical liberal tradition,[14] and no less than Rothbard he praises the market as an arena for voluntary cooperation, as "the institutional embodiment of the voluntary exchange processes that are entered into by individuals in their several capacities" (Buchanan 1979: 31). What distinguishes his contractarian liberalism is the insistence that classical liberals, if they consistently adhere to their normative individualism, are required to respect individuals as "ultimate judges" not only when they act as private law subjects *within the market arena* but also in matters of *constitutional choice*. Buchanan does not dispute Hayek's arguments on the beneficial role that cultural evolution may play as an experimental discovery process, but he insists that such arguments cannot per se answer the question of how alternative institutional arrangements – or systems of rules – are to be judged in terms of the classical liberal "individualistic value premise."[15] And as far as the "natural rights'" are concerned that Rothbard invokes as the standard for how the boundaries of individuals' private domains should be drawn, Buchanan insists that, if they are not meant outright to deny individuals' freedom to choose the rules under which they wish to live, such "natural boundaries" can have legitimizing force only to the extent that the individuals involved agree on where they lie. The "ultimate test for the existence of natural boundaries must," so Buchanan (2001 [1977]: 25) argues, "lie in the observed attitudes of individuals themselves."

[14] Buchanan (1975: 24): "Under regimes whose individual rights to do things are well defined and recognized, the free market offers maximal scope … for individual freedom in its most elementary meaning."
[15] For a comparison between Buchanan's contractarian liberalism and Hayek's evolutionary liberalism see Vanberg 1994.

From a contractarian perspective à la Buchanan, a free-market libertarian who "finds it necessary to presume that there are definite and well-understood 'natural boundaries' to individuals' rights" (ibid.: 23f.) would seem to face the following choice: If his "natural rights" are supposed to command authority independently of agreement among the individuals concerned, he must claim that those who correctly "read" these rights are entitled to override the judgment of erring dissenters, denying them the status as "ultimate judges" in constitutional matters. Alternatively, if he acknowledges that "natural rights" cannot be determined independently of "the observed attitudes of individuals themselves," he must address the issue of how, according to the individualistic value premise, such rights are supposed to be derived from individuals' "observed attitudes."[16] In other words, the free-market libertarian would have to deal with the very same problem for which Buchanan seeks to provide a consistently individualistic solution.[17]

The solution that Buchanan proposes starts from the diagnosis that, since "rules of the game," if they are to serve their coordinating function, must be shared among the parties involved, their definition is necessarily a matter of (explicit or implicit) *collective choice*,[18] and that, if such choice is to comply with the individualistic value premise, it can derive its (ultimate) legitimacy from no other source than *agreement* among the individuals involved, i.e. from the same source that provides legitimacy to voluntary market exchanges. As far as the manifold private collective associations, such as business firms or clubs, are concerned which exist within the market arena, free-market libertarians appear to have no difficulty conceding that, what legitimizes their day-to-day operation is the participants' voluntary agreement to their respective constitutions, even if these constitutions impose significant limits on the individuals' within-period freedom of choice. Buchanan does no more than extend the very same criterion that the libertarian applies to constitutional choice *within the market* to the constitutional choices that define the institutional framework *of the market*, choices that, by their very nature, cannot be made other than through the political process. This is the principal tenet of what he describes as "exchange conceptualization of politics" (Buchanan 1999 [1986]: 461), a conceptualization that generalizes "the model of voluntary

[16] If there is no agreement on what rights are "natural," conflicting interpretations can only be settled by one interpretation being imposed on those who disagree raising the question of what legitimizes such imposition. Alternatively, if there is agreement on what rules should be respected, it is the agreement that provides legitimacy, and calling the agreed-on rules "natural" serves only as an expandable decoration.

[17] Mises (1957: 49) recognizes this problem when he notes: "Thus the appeal to natural law does not settle the dispute. It merely substitutes dissent concerning the interpretation of natural law for dissenting judgments of value."

[18] Buchanan and Tullock (1962: 46) speak of the "collectivization of activity that is involved in the initial definition of human and property rights and the enforcement of sanctions against violations of these rights."

exchange among individuals" (ibid.) from simple bilateral exchange-contracts to the inclusive constitutional contracts among individuals as citizens of political communities, comparable to the inclusive constitutional contracts they enter into as members of private associations. As Buchanan (1989: 179) argues: "If politics … is modeled as a cooperative effort of individuals to further or advance their own interests and values … it is evident that all persons must be brought into agreement. … The complex exchange that describes a change in the constitution (in the rules) is no different in this fundamental respect from simple exchange between two traders."[19]

Bringing persons into agreement poses, of course, additional problems when we move from exchange *transactions*, whether bilateral or multilateral, to organizational-collective arrangements. Exchange transactions take place only if and when all trading parties agree. Absent agreement there is no transaction. By contrast, organizational-collective arrangements are based on *continuing contractual relations* the purpose of which is to allow a group of persons to carry out joint actions over a (definitive or open-ended) period of time. For such joint enterprises the agreement-issue arises at two levels, the *constitutional level* at which the rules that define the terms of operation are to be chosen, and the *sub-constitutional level* at which the day-to-day operational decisions are to be made. At both levels *collective choices* have to be made and, strictly speaking, bringing all participants into agreement would require that these choices be made unanimously. As Buchanan (1999 [1986]: 463) puts it: "The political analogue to decentralized trading among individuals must be that feature common over all exchanges, which is agreement among the individuals who participate. The unanimity rule for collective choice is the political analogue to freedom of exchange of partionable goods in markets."

If the unanimity rule is to serve for collective choices the same role that agreement among the trading parties plays in legitimizing market transactions, obvious questions of practicability arise, especially in large-number settings. As far as collective choices at the *sub-constitutional* level are concerned, Buchanan's and Tullock's classic contribution *The Calculus of Consent* (1962) specifies the arguments why rational individuals have prudential reasons to agree to forgo the veto-right that the unanimity rule would grant them. Yet, for

[19] Buchanan (1999 [1986]: 461): "Improvement in the workings of politics is measured in terms of the satisfaction of that which is desired by individuals, whatever this may be, rather than in terms of moving closer to some externally-defined, supra-individualistic ideal." – See also (ibid.; 462): "An indirect evaluation may be based on some measure of the degree to which the political process facilitates the translation of expressed individual preferences into observed political outcomes. The focus of evaluative attention becomes the process itself … (T)he constitution of politics rather than policy itself becomes the relevant object for reform."

constitutional choices the practicability of the unanimity rule remains an issue. For *private* organized collectives operating within a market arena there is a straightforward answer to this issue. Just as exchange contracts concluded within the rules of the market can be claimed to be legitimized by the voluntary agreement among the trading parties, constitutional contracts on which private organized collectives are based can equally be claimed to be legitimized by the participants' voluntary choices to join and to remain within the joint enterprise.[20] The situation is, however, obviously different as we move to the level of *organized polities*, the level where the very rights individuals enjoy as private law subjects are defined. Admittedly, the tasl to specify how individual sovereignty can be effectively exercised, and the legitimizing force of agreement be secured, at the *constitutional level of politics* poses a serious challenge to Buchanan's contractarian liberalism. Yet, this is a challenge that every classical liberal must face as soon as he seeks to consistently apply the individualistic value premise not only at the level of choices made within a framework of pre-defined individual rights but also at the level at which these very rights are defined.

Matters of Principle and Matters of Prudence in Classical Liberalism

The specific differences between the three branches of the classical liberal tradition that I have contrasted above come into sharper relief when one compares them in light of the following question: Who is the intended addressee of the arguments that they advance in support of their respective concept of the "liberal order"? It is in answering this question that the essential achievement of Buchanan's contractarian liberalism can be shown most clearly. With his insistence that a classical liberal outlook, if it is to consistently adhere to its individualistic value premise, must respect individuals as "ultimate judges" at the constitutional level of choice no less than at the level of ordinary market choices, Buchanan forces his fellow-liberals to be more conscious about whom they want to convince of the merits, or the attractiveness, of their "liberal ideal." As I will argue below, clarity on this issue helps to distinguish more convincingly between what should be treated as matters of principle and what as matters of prudence within the classical liberal tradition.

[20] As long as free entry and exit is secured for private organizations operating within a market context the constitutional contracts on which they are based can be claimed to be legitimized by the participants' voluntary agreement – as expressed by their continued participation in an organization –, even if for the prudential reasons specified by Buchanan and Tullock (1962) the constitution allows for revisions to be made without unanimous approval of all participants.

If, as Buchanan's contractarianism asserts, the individuals themselves must be respected as ultimate judges in constitutional matters, if it is their judgment that ultimately decides what counts as a "good society," then they must surely be seen as the *ultimate* addressees of whatever proposals in matters of social organization are made. To be sure, assigning to the individual group-members or citizens the status as "ultimate addressees" cannot mean that advocates of liberal constitutional proposals must always cast their arguments in a language that is suitable for *direct* communication with "the common man." As intellectuals and scholars contractarian liberals, no less than their fellow liberals, will naturally address their writings *directly* at their academic peers and it is to their critical examination that they submit their arguments. The requirement to respect individuals as the "ultimate judges" means, however, that in their academic discourse liberal scholars impose a disciplining constraint on their arguments, namely to support whatever constitutional proposals they advance with arguments that show why – paraphrasing what Hayek has said about the rules of the market as the "game of catallaxy"[21] – the individuals concerned should "have reasons to agree to the proposed constitutional regime." It is in this sense, i.e. with regard to their own judgment on what they regard as a "desirable" constitutional order, that the individuals themselves must be regarded as the *ultimate* addressees. Even if they are not the direct addressees of the arguments exchanged in academic discourse, these arguments must specify reasons for why the individual constituents of the group whose constitutional regime is under consideration can be expected to be in favor of what liberals advocate as "appropriate" rules. Or, stated in yet another way, while the respect for *individuals as sovereigns*, in matters of constitutional choice no less than in matters of private autonomy, must be treated within the liberal doctrine as a *matter of principle*, particular liberal recipes for how people should organize their social life, including the liberal preference for markets, must be argued for on *prudential grounds*. Their advocates must provide arguments for why the individuals concerned would serve their own interest when adopting the recommended recipes.

In the case of Rothbard it is quite obvious that in advocating his free-market liberalism he does not have the individual citizens in mind as the ultimate judges. Nor does he argue in terms of reasons why the individuals concerned can be expected to consider his liberal ideal more desirable than potential alternative constitutional regimes. If, as Rothbard claims, the rules of the (market) game are unequivocally given by "natural law discoverable by reason"

[21] Hayek (1978: 137): "The individuals have reasons to agree to play this game because it makes the pool from which the individual shares are drawn larger than it can be made by any other method."

then what the "rules of the game" should be is pre-ordained and cannot be a matter of individual preferences. In Rothbard's free-market liberalism individual liberty is fully realized *within* the market arena. At the constitutional level individuals are simply not "free to choose" or, more precisely, they would be simply in *error* if they were to choose rules of the game that are not consonant with the natural law. The question of how property rights should be specified and which contracts should be enforced is not a matter of evaluative judgment but of logical reasoning.

When Rothbard (1970: 653) characterizes the "purely free market" as an arena "where the individual person and property are not subject to molestation,"[22] and when he argues that so-called "external diseconomies" are not "a defect of the free market … (but) the result of invasions of property, invasions which are ruled out of the free market by definition" (Rohbard 1956: 259), he makes it appear as if the question of how the line between what individuals, in exercising their freedom of choice, are allowed and not allowed to do is a matter of logical deduction from apodictically true first principles, not something that sovereign individuals decide among themselves, weighing the advantages and disadvantages of differently drawn demarcations. Just as in the tradition of Misesean apriorism, Rothbard (1970: xi) claims to be able to deduce "the entire corpus of economics from a few simple and apodictically true axioms,"[23] his "ethics of liberty" is praised for being based on "axiomatic-deductive arguments and proofs" (Hoppe 1998: xxii).[24]

On the basis of such axiomatically deduced ethical standards Rothbard proclaims, for instance, that, by contrast to copy-right, the "patent is incompatible with the free market" (1970: 654). "The crucial difference," he reasons, "is that copyright is a logical attribute of property right on the free market, while patent is a monopoly invasion of that right" (ibid.: 655). Where such "logic" reins there is no room whatsoever for individuals to consider among each other as sovereign citizens how they would want to define copyright- and patent-rules in light of the advantages and disadvantages that they expect to result from potential alternative rules. Similarly we can, according to Rothbard, decide on apriori grounds whether cartel

[22] Rothbard (1970: 581): "'Free' … is used in the interpersonal sense of being unmolested by other persons."
[23] About "praxeology" as the foundational theory Rothbard (1970: 64) notes that it is concerned with the "formal implications of the fact that men use means to attain various ends," and he states: "Praxeology asserts the action axiom as true, and from this … are deduced, by the rules of logical inference, all the propositions of economics" (ibid.: 65). By contrast to the physical sciences in which "the premises are only hypothetical" (ibid.) this grants, as Rothbard supposes, economics an "apodictically true" foundation.
[24] Hoppe (1998: xxix) speaks of Rothbard's "rationalist-axiomatic-deductive, praxeological, or Austrian-libertarianism" and notes about "Rothbard's unique contribution to ethics": "Ethics … is demonstrably *not* dependent and contingent upon agreement or contract … Ethics is the logical-praxeological *presupposition* … rather than the result of agreement or contract" (ibid.: xxxiv).

contracts should or should not be permissible in a "free market." Against "theorists who attack cartels" because they involve collusion he argues that the "whole concept of 'restricting production' is a fallacy when applied to the free market" (Rothbard 1970: 573,568). Since in both cases, cartels and business firms, individuals voluntarily pool assets "according to rules agreed upon by all from the beginning" there is in his view "*no essential difference between a cartel and an ordinary corporation or partnersh*ip" (ibid.),[25] "nothing distinctively immoral about such action" (ibid: 564).[26]

It is because of his natural-rights based axiomatic-deductive ethics that Rothbard (1970: 562) feels entitled to reject as "inconsistent" William Hutt's arguments on "'consumer's sovereignty' as an ethical ideal against which the activities of the free market are to be judged." He does not even consider the possibility that individuals may have reasons, as sovereign citizens, to prefer a constitution that seeks to implement this "ethical ideal," and that, if he wants to dissuade them from such constitutional choice, he would need to provide arguments why they can expect their common interests to be better served by what he suggests. To provide reasons why individuals may, as a matter of prudence if not of axiomatic logic, want to adopt "consumer's sovereignty" as a *constitutional ideal* is, however, exactly the point of Hutt's arguments[27] who, in this regard, simply restated in more elaborate ways what Adam Smith (1981 [1976]: 660) had in mind when he said in critique of the mercantile system: "Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer. The maxim is so perfectly self-evident, that it would be absurd to attempt to prove it." Hutt as well as Smith provided arguments why, in comparing their merits as constitutional ideals, citizens are well advised to prefer the principle of consumer sovereignty over Rothbard's (1970: 657) "principle of maximum service to consumers and producers alike." In other words, Hutt was aware of the fact that as Buchanan (2001 [1990]: 40) puts it, at the "constitutional stage decisions must weigh the predicted costs and benefits of the alternative institutional arrangements" (Buchanan 2001 [1990]: 40). He did, as Buchanan (1991: 119) notes, "not commit the libertarian blunder of extending the

[25] Rothbard (1970: 572): "A common argument holds that cartel action involves *collusion*. … What is involved here is co-operation to increase the incomes of the producers. … What is the essence of a cartel action? Individual producers agree to pool their assets into a common lot … to make the decisions on production and price policies for all the owners … But is this process not the same as any sort of joint partnership or the formation of a single corporation?"

[26] Rothbard (1970: 570): "To regard a cartel as immoral or as hampering some sort of consumer sovereignty is therefore completely unwarranted."

[27] For a more detailed discussion see Buchanan 2001 [1988b], and Vanberg 1999: 231ff.; 2005: 37ff.

defense of the liberties of individuals to enter into ordinary voluntary exchanges to a defense of the liberties of individuals to enter into voluntary agreements in restraint of trade."

Whatever their disagreements on issues such as patents or cartels may be, my main point in comparing Buchanan's contractarian liberalism and Rothbard's free-market libertarianism is not that they differ in *what* they advocate but in *how* they advocate it. Because he insists that liberalism's individualistic value premise requires one to respect individuals as sovereigns at the constitutional level of choice no less than in their capacity as private law subjects, it is a logical conclusion for Buchanan that liberals must view their fellow citizens as the ultimate addressees of their arguments in favor of the liberal ideal they advocate. That individuals must be respected as sovereigns in constitutional matters is, from such perspective, a *matter of principle*, while the particular institutional features of the liberal ideal are considered a *matter of prudence*, to be discussed in terms of reasons that appeal to citizens' common interests. It is in this sense that Buchanan (1995/96: 267f.) argues against a too narrow interpretation of the ideal of individual liberty:

> "What is the ultimate maximand when the individual considers the organization of the political structure? … (T)his maximand cannot be summarized as the maximization of (equal) individual liberty from political-collective action. … A more meaningful maximand is summarized as the maximization of (equal) individual sovereignty. This objective allows for the establishment of political-collective institutions, but implies that these institutions be organized so as to minimize political coercion of the individual. … So long as one's agreement to such political action is voluntary, the individual's sovereignty is protected even though liberty is restricted."

It is the narrow interpretation of the ideal of individual liberty from which Buchanan distances himself that is at the very heart of Rothbard's free-market libertarianism. From its natural-rights based perspective the "purely free market" is seen as the order that is mandated, as a matter of principle, by Rothbard's "axiomatic-deductive" ethics. It is definitely not seen as a constitutional ideal that liberals must advocate to their fellow citizens on prudential grounds, i.e. in terms of reasons that appeal to their common interests.

When, in terms of their ways of advocating the ideal of individual liberty as private autonomy, Buchanan and Rothbard represent the polar ends of the liberal spectrum, Hayek's evolutionary liberalism must be placed somewhere in between. Hayek's argument for the liberal order is obviously not cast in Buchanan-type contractarian terms, nor is it grounded in a Rothbardian natural-rights approach. There are good reasons, though, to locate Hayek's thoughts on the virtues of the spontaneous market order and the discovery process of cultural evolution closer to the Buchanan-end of the spectrum than to Rothbard's side. A careful

reader of Hayek's arguments cannot fail to see that he advocates his liberal ideal by providing reasons why individuals may, on prudential grounds, want to live within a constitutional framework that provides room for private autonomy and experimental discovery.[28] He does not, like natural-rights libertarians, portray the liberal order as the imperative implication of unquestionable first principles, but emphasizes that the "defense of the free society must … show … that the members of such a free society have a good chance successfully to use their individual knowledge for the achievement of their individual purposes" (Hayek 1967: 164f.). For him the market order is not a matter of logical necessity – or of principle – but a matter of prudential constitutional choice. This is clearly reflected in his already mentioned statement on the market as the "game of catallaxy": "The individuals have reasons to agree to play this game because it makes the pool from which the individual shares are drawn larger than it can be made by any other method" (Hayek 1978: 137).

Hayek's arguments on the "use of knowledge in society" [29] and on competition as a discovery procedure which are at the core of his entire work can, in this sense, be understood as providing prudential reasons for why individuals should prefer a market order and a political constitution that leaves room for institutional variation and for cultural evolution to play their knowledge-creating role.[30] As the great advantage of a spontaneous, self-generating order he emphasizes that it makes "possible the utilization of widely dispersed knowledge" (Hayek 1978: 136), and on the advantage of competition he notes that it "is the most effective discovery procedure which will lead to the finding of better ways for the pursuit of human aims" (ibid.: 149).

Since for both, Hayek and Rothbard, Ludwig von Mises has been a most important influence, it is worth mentioning that their divergent views reflect an ambiguity in Mises' own writings. While Rothbard may cite for his support Mises' (2005: 61) statement that "liberalism is derived from the pure science of economics and sociology which make no value judgements," [31] Hayek's view may find support in Mises' assertion that "liberalism has

[28] Hayek (1967: 162): "Adam Smith and his followers developed the basic principles of liberalism in order to demonstrate the desirability of their general application."
[29] In Hayek 1948, pp. 77-91.
[30] Hayek (1973: 56) speaks of „the insight that the benefits of civilization rest on the use of more knowledge than can be used in deliberately concerted effort."
[31] The context in which this sentence appears indicates, though, that Mises' statement need not at all be read as an a-priori justification of liberalism but, instead, as asserting that – in advocating the ideal order – liberals can count on the support of scientific insights that demonstrate the „unworkability" – and therefore the unattractiveness – of potential alternative regimes. As Mises (ibid.: 61f.) puts it: "These sciences show us that of all the conceivable alternative ways of organizing society only one, viz., the system based on private ownership of the means of production, is capable of being realized, because all other conceivable systems … are

always in view the good of the whole" (ibid.: xxii),[32] and that liberals, if "they considered the abolition of the institution of private property in the general interest, they would advocate that it be abolished" (ibid.: 11).

Buchanan's Contractarian Constitutionalism and Modern Liberalism

Once classical liberals recognize that consistency requires them to respect individuals as constitutional sovereigns, and that it is to them that their arguments in support of the liberal order must ultimately be addressed, it should be obvious that the question of how the process of collective constitutional choice can be organized in such fashion that individuals can meaningfully exercise their sovereignty at that level must be part of the liberal research agenda. It is Buchanan's singular merit to have devoted much of his research effort to addressing this very question and to have, thereby, developed a classical liberal outlook at democracy that complements, as a consistent counterpart, the traditional theory of the spontaneous market order and the private law society. In fact Buchanan deserves to be credited for having shown how the two liberal traditions, the "British" and the "Continental", that Hayek contrasts as if they were estranged relatives, can be integrated into one coherent theoretical framework. About the two traditions Hayek (1978: 120) writes: "While to the older British tradition the freedom of the individual in the sense of a protection by law against all arbitrary coercion was the chief value, in the Continental tradition the demand for self-determination of each group concerning its form of government occupied the highest plain. This lead to an early association and almost identification of the Continental movement with the movement for democracy which is concerned with a different problem from that which was the chief concern of the liberal tradition of the British type."

By characterizing the British tradition as the "evolutionary type of liberalism" (ibid.: 132) and the Continental tradition as the "constructivist type" (ibid.) Hayek made it appear as if there were a fundamental conceptual divide between the two traditions, due to differences in their respective views on how the rules of the liberal order came about or may be usefully

unworkable…" And further: "What liberalism maintains is … that for the attainment of the ends that men have in mind only the capitalist system is suitable" (ibid.: 63).

[32] Mises (2005: xxii f.): „…liberalism was the first political movement that aimed at promoting the welfare of all…Liberalism is distinguished from socialism, which likewise professes to strive for the good of all, not by the goal at which it aims, but by the means that it chooses to attain that goal."

modified, -- the British tradition emphasizing the role of evolutionary forces[33], the Continental tradition emphasizing the role of deliberate legislation. Focusing thereby attention on what should be treated as matters of prudence Hayek distracted from the much more important fact that, due to their shared individualistic value premise, the two traditions are united in matters of principle, namely equally respecting individuals as sovereigns, a unity that calls for their theoretical integration.

The need to achieve a theoretical integration of the liberal outlook at markets and the individualistic approach to politics is exactly what Buchanan has emphasized in his work, along with important suggestions for how such integration may be achieved. It is, as he has stressed once and again, the generalization of the notion of "mutual gains from voluntary exchange" from the market arena to the arena of political collective action that is the guiding theme of his research program. As he puts it:

> "If we adhere strictly to the individualist benchmark, there can be no fundamental distinction between economics and politics, or more generally between economy and polity. The state, as any other collective organization, is created by individuals, and the state acts on behalf of individuals. Politics, in this individualistic framework, becomes a complex exchange process, in which individuals seek to accomplish purposes collectively that they cannot accomplish noncollectively or privately in any tolerably efficient manner. The catallactic perspective on simple exchange of economic goods merges into the contractarian perspective on politics and political order" (Buchanan 2001[1988a]: 62]).

This is what Buchanan has in mind when he speaks of an "individualist-democratic methodology" (1975: 5), when he describes himself as, "in basic values, an individualist, a constitutionalist, a contractarian, a democrat – terms that mean essentially the same thing to me" (ibid.: 11), or when he characterizes his approach as "democratic, which in this sense is merely a variant of the definitional norm of individualism" (ibid.: 4).

Even if he has not as expressly as Buchanan emphasized the fact that their common individualistic value premise unites the liberal ideal of individual liberty and the democratic ideal of citizen sovereignty, Hayek (1948: 29) asserts: "True individualism not only believes in democracy but can claim that democratic ideals spring from the basic principles of individualism."[34] He has repeatedly pointed out that the legitimizing principle in democratic

[33] Hayek (1978: 136): „The rules conducive to the formation of such a spontaneous order were regarded as the product of long experimentation in the past. And though they were regarded as capable of improvement it was thought that such improvement must proceed slowly and step by step as new experience showed it to be desirable."

[34] Hayek (1978: 143): "Thus, though the consistent application of liberal principles leads to democracy, democracy will preserve liberalism only if, and so long as, the majority refrains from using its powers to confer

politics must be seen in "the consent of the people" (Hayek 1979: 3 and 4) and that the "ultimate justification" for conferring the power to coerce to a democratic government is "that all have … an interest in the existence of such power" (ibid.: 6).[35]

By contrast to natural-rights libertarians – whose failure to adequately separate matters of principle from matters of prudence in the liberal doctrine impedes their capacity to productively discuss policy issues with their fellow citizens – Hayek explicitly recognizes the need for liberals to convince their fellow citizens of the *advantages* of the principles they advocate.[36] While they may well, so he argues, disagree with what the majority decides, they can nevertheless agree to "majority rule as a method of deciding."[37] The principles that the liberal advocates, so Hayek (1960: 115) argues, are "not proved wrong if democracy disregards them, nor is democracy proved undesirable if it often makes what the liberal must regard as wrong decisions."[38]

Before concluding this paper it is worth mentioning an aspect of Buchanan's constitutional economics that even some of his most sympathetic readers have found puzzling, which is, however, as I submit a straightforward implication of his contractarian outlook. As an *economic* approach Buchanan's constitutionalism starts naturally from the Smithean view that it is not in counting on human "benevolence" that we can hope to build a "good society" but in establishing and enforcing a framework of "rules of the game" that channel self-

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on its supporters special privileges which cannot be similarly offered to all citizens." – It is worth noting that von Mises has also emphasized the common individualist foundation of the ideals of liberalism and democracy. The "nineteenth-century philosophy of liberalism," he argued, "assigned supremacy to the common man. In his capacity as a consumer the 'regular fellow' was called upon to determine ultimately what should be produced, in what quantity and of what quality, by whom, how, and where; in his capacity as voter, he was sovereign in directing his nation's policies" (Mises 2005: xiii). – See also Mises (1949: 271): A "democratic constitution is a scheme to assign to the citizens in the conduct of government the same supremacy the market gives them in their capacity as consumers."

[35] Hayek (1960: 106): "To him (the liberal, V.V.) it is not from a mere act of will of the momentary majority but from a wider agreement on common principles that a majority decision derives its authority. …(The) authority of democratic decisions rests on … certain beliefs common to most members … (The) acceptance of such common principles … is the indispensable condition for a free society."

[36] It is in a similar spirit when Mises (1985: 68) notes: "Government must be forced into adopting liberalism by the power of the unanimous opinion of the people."

[37] Hayek (1960: 103f.): "Its (liberalism's, V.V.) aim, indeed, is to persuade the majority to observe certain principles. It accepts majority rule as a method of deciding, but not as an authority for what the decision ought to be." And further: "Majority decisions tell us what people want at the moment, but not what it would be in their interest to want if they were better informed … True, there is the convention that the view of the majority should prevail so far as collective action is concerned, but this does not in the least mean that one should not make every effort to alter it. One may have profound respect for that convention and yet very little for the wisdom of the majority" (ibid.: 109).

[38] Hayek (1960: 115): "He (the liberal, V.V.) simply believes that he has an argument which, when properly understood, will induce the majority to limit the exercise of its own powers and which he hopes it can be persuaded to accept as a guide when deciding on particular issues." – And further: "It is not 'antidemocratic' to try to persuade the majority that there are limits beyond which its action ceases to be beneficial and that it should observe principles which are not of its own deliberate making" (ibid.: 117).

interested human behavior in socially beneficial directions. In the founding treatise of constitutional economics, *The Calculus of Consent*, Buchanan and Tullock (1962: 23) note that "the theory of markets or the competitive organization of economic activity is based" on the Smithean insight that "insofar as possible, institutions and legal constraints should be developed which will order the pursuit of private gain in such a way as to make it consistent with" the common interest of the group as a whole. The aim they pursue with *The Calculus* is, as they put it, to extend this very insight to the realm of politics, "pointing the way toward those rules for collective choice-making, the constitution, under which the activities of political tradesmen can be … reconciled with the interests of all members of the group" (ibid.: 23) in similar ways in which Smith had shown how "the self-seeking activities of the merchant and the moneylender tend to further the general interests of everyone in the community" (ibid.).

It is, however, one thing to explain how under "appropriate rules" self-interested individuals can come to play mutually beneficial games, and it is quite another thing to explain how self-interested individuals come to establish among themselves "appropriate rules," rules which serve their *common* interests. *Common interests* are a necessary but not a sufficient requirement to achieve effective agreement in constitutional matters. To be sure, to the extent that individuals are free to move between communities with different constitutional regimes they may be able individually and separately to realize their constitutional preferences by joining those regimes that best suit their preferences. Yet, in order for individuals to be able to choose between different regimes these regimes must, in the first place, be established and maintained *within* the communities between which they may move. And for this internal problem of constitutional choice individual migration does not provide a solution. Within each community rules that serve the common interest of all its members are obviously a paradigm example of a collective good, and in large number settings there may, as Buchanan (1999 [1989]: 370) points out, "exist little or no incentive for any single player to participate actively in any serious evaluation of the rules," such that "the fully rational player will refrain from participating in the choice among regimes."

What may have irritated some readers is the conclusion Buchanan (ibid.: 371) draws in regard to the collective-good problem in constitutional choice, namely "that becoming informed about, and participating in the discussion of, constitutional rules may require the presence of some ethical precept that transcends rational interest for the individual." Such conclusion, they suspect, looks as if Buchanan's *economic* approach admits defeat at the very

level of analysis that is its special domain, abandoning, when it comes to matters of constitutional choice, the very behavioral assumption that is at the core of the economic tradition in the social sciences. Yet, in my reading, Buchanan is here not calling for a shift in behavioral assumptions but, instead, he diagnoses a plain fact, namely that in a community the prospects of "playing a better game" will critically depend on its members willingness to constructively participate in a constitutional discourse with the aim of identifying and implementing rule-changes that promise mutual benefits. A community of narrowly self-interested individuals who are simply unwilling to invest in such constructive participation will simply fail to realize mutual gains that could be had. In the face of such dismal prospects rational individuals should, in their capacity as member of communities, be able to recognize that there are prudential grounds for them to encourage in each other an attitude of *democratic citizenship*, a sense of shared responsibility for their common affairs. This is, I submit, the essential message when Buchanan (ibid.; 369) states: "I want to suggest here that each one of us, as a citizen, has an *ethical obligation* to enter directly and/or indirectly into an ongoing and continuing constitutional dialogue."

The constitutional interests that members of a community may have in common do not become effective by themselves. They have to be politically implemented. This insight leads to the recognition that the willingness to constructively participate in the project of constitutional maintenance – or, in short, *democratic citizenship* – is an attitude that should be deliberately cultivated. Calling for such an attitude does not mean to ask individuals to sacrifice their own interests for the "common good." It means, instead, asking them to do – in their own interest – their share in maintaining the very prerequisites that allow them to successfully pursue their own interests.

Conclusion

Hayek has been rightly praised for his most important role in the modern revival of classical liberalism. I want to submit, though, that a truly "modern" liberalism must fill a void in the classical liberal tradition that Hayek only started to address, namely to complement the well-developed liberal theory of the market by a consistent liberal theory of democracy.[39] As I have argued above, to have shown how this void may be filled is the specific contribution of James Buchanan to a *modern* liberalism. It is not the least important feature of his

[39] See on this issue also Vanberg 2008 and 2011.

contractarian-constitutionalist approach that it draws attention to the fact that markets and politics are both to be judged in terms of their capacity to allow the individuals involved to realize mutual gains, and that – in contrasting market and democracy – we must keep in mind that there is neither a "market as such" nor a "democracy as such." Both, markets and democracies exist only as arenas for social cooperation that are framed by specific "rules of the game" and their working properties will be critically dependent on the nature of these rules. Accordingly, liberals who care about how the prospects for individuals to realize mutual gains, in the market arena as well as in politics, might be improved, should focus their research ambitions on comparing specific institutional alternatives for how social cooperation may be organized in both these realms.

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